

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

7 MARITTE FUNCHES,)
8 Plaintiff,)
9 vs.)
10 E.K. McDANIEL,)
11 Defendants.)

CV-N-05-0174-LRH (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

August 2, 2006

13 This Report and Recommendation is made to the Honorable Larry R. Hicks, United States
14 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
15 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary
16 judgment (#28). Plaintiff opposed (#30), and defendants replied (#31).
17

18 The court has thoroughly reviewed the record and the motion and recommends that defendants'
19 motion for summary judgment (#28) be granted.

I. HISTORY & PROCEDURAL BACKGROUND

21 Plaintiff Marritte Funches (“plaintiff”) is a prisoner at Ely State Prison (“ESP”) in the
22 custody of the Nevada Department of Corrections (“NDOC”) (#15). Plaintiff brings his
23 complaint pursuant to 42 U.S.C. § 1983, alleging prison officials violated his Eighth Amendment
24 right against cruel and unusual punishment by failing to provide him with adequate medical
25 treatment¹. *Id.* Plaintiff names as defendants E.K. McDaniel, ESP warden; Dr. Steven

¹Plaintiff's complaint purportedly states a Fourteenth Amendment claim as well; however, all facts he alleges appear to constitute Eighth Amendment claims (#15).

1 MacArthur, ESP medical director; Jane Does 1-2, ESP medical staff; and ESP correctional officer
 2 John Doe.² *Id.*

3 In count I of the first amended complaint, plaintiff alleges that on or about August 9, 2004,
 4 he was held in the prison infirmary against his will (#15). Plaintiff claims that prison medical
 5 staff subjected him to painful treatments including blood work and intravenous administration
 6 of antibiotics that were unnecessary and administered against his will and that Dr. MacArthur told
 7 him that if he did not submit to these treatments, he would be denied any further care. *Id.*
 8

9 In count II, plaintiff alleges that from September through November 2004, defendants
 10 ignored plaintiff's repeated requests for medical treatment (#15).³ Plaintiff argues that he needed
 11 to be seen by an ear nose and throat specialist ("ENT"), but defendants refused. *Id.* Plaintiff also
 12 claims that though defendant Dr. MacArthur treated him with antibiotics for recurring urinary
 13 infections, the pain and infections always returned (#1, medical kite attached thereto, dated
 14 2/17/05). Plaintiff seeks compensatory and punitive damages as well as injunctive relief (#15).

15
 16 Defendants move for summary judgment (#28).

17
 18 **II. DISCUSSION & ANALYSIS**

19
 20 **A. Discussion**

21
 22 **1. Summary judgment**

23 Summary judgment allows courts to avoid unnecessary trials where no material factual
 24 disputes exist. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture*, 18 F.3d 1468, 1471 (9th
 25 Cir. 1994). In deciding whether to grant summary judgment, the court must view the evidence

26
 27
 28 ²Plaintiff filed his original complaint (#1) and motion for preliminary injunction (#2) on March 25,
 29 Plaintiff filed his first amended complaint on August 8, 2005 (#15). The District Court denied
 plaintiff's motion for preliminary injunction on December 9, 2005 (#16, 20).

³The medical kites and grievance forms are attached to the plaintiff's original complaint (#1) and
 are referenced by date.

1 and any inferences arising from the evidence in the light most favorable to the nonmoving party.
2 *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). The court grants summary judgment if
3 no genuine issues of material fact remain in dispute and the moving party is entitled to judgment
4 as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there
5 is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party.
6 FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue,
7 however, summary judgment should not be granted. *Warren v. City of Carlsbad*, 58 F.3d 439,
8 441 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996).

9
10 The moving party bears the burden of informing the court of the basis for its motion, and
11 submitting evidence which demonstrates the absence of any genuine issue of material fact.
12 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
13 the party opposing the motion may not rest upon mere allegations or denials in the pleadings but
14 must set forth specific facts showing that there exists a genuine issue for trial. *Anderson v.*
15 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

16
17 Only evidence which might be admissible at trial may be considered by the court in ruling
18 on a motion for summary judgment. FED. R. CIV. P. 56(c); *Beyene v. Coleman Security Services,*
19 *Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Evidence without a proper foundation cannot support
20 a motion for summary judgment. *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir.
21 1987).

22
23 Material facts are facts that might affect the outcome of the case; the court determines
24 materiality by reference to the substantive law that controls the case. *Anderson*, 477 U.S. at 248.
25 Disputes over irrelevant or unnecessary facts should not be considered. *Id.* If, given the evidence
26 submitted, a reasonable jury could hold for the nonmoving party, the dispute over material fact
27
28

is “genuine.” *Id.* Where there is a complete failure of proof on an essential element of the case for the nonmoving party, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

2. Deliberate indifference and sufficiently serious harm

The Eighth Amendment prohibits the imposition of cruel and unusual punishments and “embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal quotations omitted). In *Farmer v. Brennan*, the Supreme Court reiterated the standards for prevailing on an Eighth Amendment claim. 511 U.S. 825, 828 (1994). The court once again stated that “[a] prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” *Id.*, citing *Helling v. McKinney*, 509 U.S. 25 (1993), *Wilson v. Seiter*, 501 U.S. 294 (1991), and *Estelle*, 429 U.S. 97. To establish an Eighth Amendment violation, a plaintiff’s case must satisfy an objective standard -- that the deprivation was serious enough to amount to cruel and unusual punishment, and a subjective standard -- deliberate indifference. *See Wilson*, 501 U.S. at 297-304; *see also Farmer*, 511 U.S. at 834.

The subjective standard of deliberate indifference for Eighth Amendment liability requires “more than ordinary lack of due care for the prisoner’s interests or safety.” *Farmer*, 511 U.S. at 835, quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The requisite state of mind lies “somewhere between the poles of negligence at one end and purpose or knowledge at the other.” *Id.* at 836. It is the equivalent of recklessly disregarding a substantial risk of serious harm to the inmate. *Id.*

“[D]eliberate indifference to a prisoner’s serious illness or injury” is a violation of the Eighth Amendment prohibition against cruel and unusual punishment. *Estelle*, 429 U.S. at 105.

1 In order to prove deliberate indifference, plaintiff must show that prison staff denied, delayed, or
2 intentionally interfered with medical treatment or that the way prison staff provided medical care
3 indicates deliberate indifference, and that plaintiff sustained damages as a result of such conduct.
4 *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988). Indifference may be manifested
5 by prison staff intentionally denying or delaying access to medical care or intentionally interfering
6 with treatment once prescribed. *Estelle*, 429 U.S. at 104-05.

8 Mere negligence on the part of prison medical staff is not sufficient to prove deliberate
9 indifference. *Id.* “A defendant must purposefully ignore or fail to respond to a prisoner’s pain
10 or possible medical need in order for deliberate indifference to be established.” *McGuckin v.*
11 *Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), *overruled in part on other grounds in WMX*
12 *Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997). Prison medical staff does not violate
13 the Eighth Amendment simply because their opinions concerning medical treatment conflict with
14 the opinion of the inmate-patient. *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).
15 Failure to allow every requested visit to a doctor does not constitute medical indifference where
16 the evidence shows that an inmate received medical treatment. *See Estelle*, 429 U.S. at 106-07.
17

18 **3. Requirement of personal participation and respondeat superior**

20 “Liability under section 1983 arises only upon a showing of personal participation by the
21 defendant. A supervisor is only liable for constitutional violations of [her] subordinates if the
22 supervisor participated in or directed the violations, or knew of the violations and failed to act to
23 prevent them. There is no respondeat superior liability under section 1983.” *Taylor v. List*, 880
24 F.2d 1040, 1045 (9th Cir. 1989) (citation omitted); *see also Mabe v. San Bernardino County*, 237
25 F.3d 1101, 1109 (9th Cir. 2001).

27
28

1 Because there is no respondeat superior liability under § 1983, liability of a supervisor
 2 requires an affirmative act, or failure to act where there is an affirmative duty. *Harris v.*
 3 *Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997). For example, in *Harris* the court held that FBI
 4 supervisors were liable for the shooting of a defendant where the supervisors were alleged to have
 5 developed a plan that resulted in the shooting. *Id.* However, the court was careful to note that
 6 this was not liability under a theory of respondeat superior. *Id.* Rather, the supervisors were
 7 directly liable because of their affirmative acts. *Id.* “A supervisor may be liable if there exists
 8 either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient
 9 causal connection between the supervisor’s wrongful conduct and the constitutional violation.”
 10 *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation
 11 omitted). “The requisite causal connection can be established . . . by setting in motion a series
 12 of acts by others which the actor knows or reasonably should know would cause others to inflict
 13 the constitutional injury.” *Id.* at 1447, quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir.
 14 1978). The court noted that this is not a form of vicarious liability, but is direct liability. *Id.*

17 **4. Persons amenable to suit under § 1983**

18 State officials sued in their official capacity for damages are not persons for purposes of
 19 § 1983. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n.24 (1997); *Will v.*
 20 *Michigan Dep’t. Of State Police*, 491 U.S. 58, 71 (1989). State officials sued in their official
 21 capacity for injunctive relief, however, are persons for purposes of § 1983. *See Will*, 491 U.S.
 22 at 71, n.10.

23 State officials sued in their personal capacity for monetary damages are persons for
 24 purposes of § 1983. *See Hafer v. Melo*, 502 U.S. 21, 31 (1991). Liability in a personal capacity
 25 suit can be demonstrated by showing that the official caused the alleged constitutional injury.

1 *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). The official in a personal-capacity suit may,
 2 depending on the facts, be able to establish immunity from claims for damages. *See id.* at 166-67.

3 **5. Punitive damages**

4 Punitive damages are available under §1983. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499
 5 U.S. 1, 17 (1991); *Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993). State officials sued
 6 in their official capacity are . . . immune from punitive damages. *Mitchell v. Dupnik*, 75 F.3d 517,
 7 527 (9th Cir. 1996). Punitive damages are awarded at the jury's discretion. *See Smith v. Wade*,
 8 461 U.S. 30, 54 (1983); *Woods v. Graphic Communications*, 925 F.2d 1195, 1206 (9th Cir. 1991).
 9 The jury must find either that the defendant acted with an evil motive or demonstrated reckless
 10 indifference to the constitutional rights of the plaintiff. *See Smith*, 461 U.S. at 56; *Mitchell*, 75
 11 F.3d at 527 n.7.

12 **B. Analysis**

13 Defendants argue that plaintiff has failed to show that they were deliberately indifferent
 14 to his serious medical needs (#28). Defendants assert that they were responsive and timely in
 15 addressing plaintiff's medical concerns. *Id.* Defendants contend that plaintiff's medical kites and
 16 records show that they responded appropriately to plaintiff's complaints regarding ear pain and
 17 pain in his kidney area. *Id.* Defendants point out that plaintiff does not allege that defendant
 18 McDaniel personally participated in his treatment. *Id.* Defendants argue that they are not
 19 amenable to suit for damages in their official capacities and also that they are entitled to qualified
 20 immunity. *Id.* Finally, defendants assert that plaintiff fails to allege the malicious, wanton, or
 21 oppressive conduct necessary to support a claim for punitive damages. *Id.*

22 Plaintiff argues that he did not receive proper medical treatment by Dr. MacArthur (#30).
 23 Plaintiff asserts that the prescribed antibiotics have not eased his constant pain (#15; #28 Ex. A,
 24

1 medical kites attached thereto, bates stamped A042). Plaintiff alleges that Dr. MacArthur was
2 deliberately indifferent by ignoring plaintiff's many requests for further diagnosis and treatment
3 (#30, #28, Ex. A, A042-A044).

4 Plaintiff and defendants offer medical kites and progress notes that reflect the following
5 course of treatment. Dr. MacArthur examined plaintiff on August 3, 2004 for pain and swelling
6 in his left ear and jaw. *Id.*, Ex. A, progress notes attached thereto bates stamped A025. Dr.
7 MacArthur attests that after consultation with an ENT, plaintiff was admitted to the infirmary on
8 August 9, 2004 in order to receive antibiotics intravenously (#28, Ex. C, affidavit of Dr.
9 MacArthur). Dr. MacArthur also states plaintiff was placed in his own medical cell in the
10 infirmary because he previously had had an altercation with another inmate. *Id.* Blood work
11 performed on plaintiff on September 7, 2004 was normal (#28, Ex. A, A083-A084).

14 Next, plaintiff complained of pain and requested that he see an ENT for his throat, as well
15 as a kidney specialist because he believed his pain might signal kidney stones (#1, medical kites
16 dated 9/16/04, 9/22/04, 9/25/04, 10/01/04, 11/03/04). Dr. MacArthur responded on the forms that
17 plaintiff's recent blood work was normal (9/25/04), that the doctor had not identified any medical
18 problems to treat (11/03/04), that plaintiff's life was not at risk (9/22/04) and that over-the-
19 counter medicines in the canteen were all that was available to plaintiff for chronic pain (9/16/04).
20 Plaintiff then pursued a grievance requesting further medical care (#1, grievances attached
21 thereto, dated 9/19/04, 10/11/01, 10/28/04). Dr. MacArthur stated that plaintiff's life was not in
22 danger, and plaintiff was advised that he could schedule another visit at his own expense. *Id.*
23

25 In January 2005, plaintiff submitted three medical kites about the same complaints (#1,
26 medical kites dated 1/8/05, 1/12/05, 1/19/05). Dr. MacArthur responded that after plaintiff's
27 initial January complaint, his urine was tested and he was treated for a minor infection (#1,
28

1 medical kites dated 1/8/05, 1/12/05). On January 15, 2005, plaintiff also filed an inmate request
2 form with defendant Warden McDaniel (#1, inmate request form attached thereto, dated 1/15/05).
3 The warden responded that this issue was between plaintiff and the doctor. *Id.* Plaintiff
4 submitted an inmate interview request to the warden on January 24, advancing similar complaints
5 and suggesting that Dr. MacArthur is racist and prejudiced against Muslims (#1, inmate interview
6 request attached thereto, dated 1/24/05). The warden responded that Dr. MacArthur is capable
7 of making medical decisions. *Id.*

9 On February 17, 2005, plaintiff submitted a medical kite claiming that the doctor
10 continued to give him antibiotics for recurring urinary infections, but the pain and infections
11 always returned (#1, medical kite attached thereto, dated 2/17/05). Dr. MacArthur clarified in his
12 response that he gave plaintiff antibiotics once to treat a trace of protein in plaintiff's urine and
13 that no further action was required. *Id.*

15 In April 2005, a CT scan of plaintiff's abdomen and pelvis revealed a lesion too small to
16 characterize that was deemed a probable cyst (#28, Ex. A, A085). The scan also showed no
17 evidence of acute inflammatory disease. *Id.* In May 2005, Dr. MacArthur consulted a urologist
18 regarding plaintiff's urinalysis who stated that plaintiff's urinary tract was normal (#28, Ex. A,
19 A081; Ex. C).

21 As an initial matter, the court finds that because plaintiff does not allege that defendant
22 McDaniel personally participated in his medical treatment (*see #15*), McDaniel cannot be liable
23 for any alleged Eighth Amendment violations. *Taylor*, 880 F.2d at 1045. Turning to Dr.
24 MacArthur, the court finds that he did not act with deliberate indifference to plaintiff's medical
25 needs. *See Wilson*, U.S. at 297-304; *see also Farmer*, 511 U.S. at 834. Even assuming,
26 *arguendo*, that plaintiff had serious medical needs, Dr. MacArthur responded in a timely manner
27

1 to plaintiff's complaints (*See generally* #28, Ex. A). Medical staff has examined and tested
2 plaintiff, including completing blood work and urinalysis, and administering a CT scan, and has
3 treated plaintiff when necessary. *Id.* According to Dr. MacArthur's responses, plaintiff has no
4 serious medical problems requiring treatment (#1, medical kites attached thereto). Dr. MacArthur
5 has not violated the Eighth Amendment simply because plaintiff disagrees with his opinions
6 concerning plaintiff's medical treatment. *Franklin*, 662 F.2d at 1344. Plaintiff has not
7 demonstrated that he was deprived of necessary medical care. *Farmer*, 511 U.S. at 298.
8 Accordingly, defendants' motion for summary judgment is granted. Thus, the court need not
9 consider defendants' other arguments.
10

III. CONCLUSION

13 Based on the foregoing and for good cause appearing, the court concludes that plaintiff
14 has not demonstrated that defendants violated his Eighth Amendment rights with respect to
15 plaintiff's medical treatment. As such, the court recommends that defendants' motion for
16 summary judgment (#28) be granted.

The parties are advised:

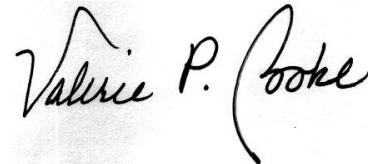
19 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
20 the parties may file specific written objections to this report and recommendation within ten days
21 of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and
22 Recommendation” and should be accompanied by points and authorities for consideration by the
23 District Court.

25 2. This report and recommendation is not an appealable order and any notice of appeal
26 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
27 judgment.

1 _____ **IV. RECOMMENDATION**

2 **IT IS THEREFORE RECOMMENDED** that defendants' motion for summary
3 judgment (#28) be **GRANTED**.

4 **DATED:** August 1, 2006.

5 
6

7 **UNITED STATES MAGISTRATE JUDGE**

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28